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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 247

JANEL SALES CORP.,

Petitioner,

—v.—

PARKE, DAVIS & COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

This brief is submitted in opposition to the petition of Janel Sales Corp. for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Second Circuit. For the reasons hereinafter set forth, Parke, Davis & Company, respondent, respectfully submits that the petition of Janel Sales Corp. should be denied.

Opinions Below

The opinion of the Trial Court was unofficially reported in the Trade Reg. Rep. (1963 Trade Cas. ¶70,849, S.D.N.Y. July 16, 1963). It was not officially reported. The opinion

in the Court of Appeals has been reported as stated by petitioner.

Jurisdiction

Petitioner contends that the jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) alleging that the opinion below is in conflict with the decision of the Court of Appeals for the First Circuit in *Esso Standard Oil Co.* v. *Secatore's Inc.*, 246 F. 2d 17 (1st Cir. 1957) and that the Court of Appeals in its opinion below failed to follow and limited the application of the decision of this Court in *United States* v. *McKesson & Robbins*, 351 U.S. 305 (1956). As hereinafter noted, it is respondent's position that the alleged conflicts do not exist because the facts in this case do not bring it within the legal principles enunciated in the *Secatore's* or the *McKesson & Robbins* cases. This case merely presents issues of fact of importance only to the litigants themselves and does not involve a substantial federal question.

Statutes Involved

In addition to the statutes set out in the petition for certiorari, this case also involves the Feld-Crawford Act, New York Gen. Bus. Law, § 369(a), (b), the pertinent portions of which are set forth in Appendix I, *infra*. Also involved is the Administrative Code of the City of New York, § N41-1.0, the pertinent portions of which are set forth in Appendix II, *infra*.

Questions Presented*

1. Is Parke, Davis & Company engaged in the retail drug business?

2. Does Parke, Davis & Company sell its products in competition with retailers who have signed its retail fair-trade contracts or with petitioner, Jamel Sales Corp.?

3. Are the findings of fact of the Trial Judge clearly erroneous?

Statement

Petitioner's whole argument in this case is that Parke, Davis' fair trade contracts are illegal under the Sherman Act in that they do not come within the exemptions of the Miller-Tydings Act, 15 U.S.C. § 1, or the McGuire Act, 15 U.S.C. § 45(a)(1). The basis of its argument is that Parke, Davis & Company is in the retail drug business

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* Petitioner has listed three questions in its petition for a Writ of Certiorari. They are in substance as follows:

1. Whether the exemptions in the Miller-Tydings and McGuire Acts permit a producer who sells directly to certain classes of consumers to utilize price maintenance contracts to control the prices of competing retailers.

2. Whether the Miller-Tydings and McGuire Acts exemptions permit the enforcement of fair trade contracts between persons or firms in competition with each other.

3. Whether the limitations on the scope of exemptions provided in the Miller-Tydings and McGuire Acts as set forth in the *McKesson & Robbins* case apply to a producer who admittedly sells in competition with retailers upon whom such producer imposes the restrictions of state fair trade laws.

These questions beg the essential issues in this case. They assume that Parke, Davis & Company and petitioner are selling goods to consumers and are in competition with each other. The Trial Judge found that they are not. Finding of Fact No. 21.

and that it is in competition with the retail druggists who signed its fair trade contracts and with Janel. The Trial Judge made the following finding of fact:

> (21) Plaintiff is not engaged in the retail drug trade and does not sell its products in competition with retailers who have signed its fair trade contracts or with the defendant. The fact that plaintiff paid New York City sales taxes on some of its goods is insufficient to establish that plaintiff is engaged in the retail trade.

The fundamental question thus is whether this finding is clearly erroneous. We respectfully submit that it is not.

Parke, Davis & Company is a manufacturer of pharmaceutical drugs. It produces a complete line ranging from narcotics, antibiotics and hormones to aspirin tablets, vitamins and surgical dressings. It distributes its products in two ways. It sells them to wholesale druggists who in turn distribute them to retail drugstores, hospitals and clinics. It also sells its products directly to retail druggists and to hospitals, industrial clinics and veterinary hospitals. It does not sell directly to individual physicians as is suggested in the petition at page 4.

Parke, Davis & Company has had a policy of many years standing under which it sells its pharmaceutical drugs only to accounts that are under the direct supervision of a physician or pharmacist. This policy was adopted by reason of the fact that many of its products are narcotics and other highly potent drugs which are restricted by law to dispensation upon the prescription of duly licensed physicians. 21 U.S.C. § 353(b)(1).

Retail drug stores are supervised by registered pharmacists; veterinary hospitals by licensed veterinarians;

hospitals and clinics by physicians. A clinic is a location where people are treated for illness as distinguished from a hospital which provides for overnight care. Before selling to an industrial clinic, Parke, Davis requires that it be manned by a competent staff; that it be under the supervision of a physician with a pharmacist or a nurse to handle the details.

Because of these sales by Parke, Davis to hospitals, industrial clinics and veterinary hospitals, petitioner contends that Parke, Davis is engaged in the retail trade and thus competes with Janel and with the retail druggists with whom it has entered into retail fair trade contracts. Parke, Davis vigorously denies that such sales are made at retail. It is licensed by the Board of Pharmacy to do business as a wholesaler and these are sales at wholesale.

Petitioner contends that these categories of Parke, Davis' customers are ultimate consumers, purchasing for their own use. This is an assumption and is completely unsupported by fact. The ultimate consumer at an industrial clinic is not the industrial concern or the clinic but the employee who comes to the clinic for attention to his health needs. The ultimate consumer at a hospital or clinic is the patient to whom the drugs are administered, not the hospital or clinic.

Parke, Davis has absolutely no contact with the ultimate consumer in any of its sales to these types of accounts. The industrial clinics with whom Parke, Davis deals employ a part or full time physician, a registered nurse or a pharmacist, each of whom is engaged in the servicing of the health needs of company employees and who dispenses drugs to employees as their needs require.

In a hospital or physician's clinic, a physician prescribes a certain drug for his patient. The hospital pharmacy or

the dispensary at the clinic is advised of this prescription and the drugs are provided for consumption by the patient. Upon leaving the hospital or clinic, the patient is presented with a bill wherein is found a charge for the products which have been administered.

A veterinarian who buys drugs from Parke, Davis administers them to his patients, be they dogs, cats or cattle, or sells or gives them to the person responsible for the animal for administration as directed. It should be clear that none of the above mentioned types of accounts are ultimate consumers nor are they purchasing for their own use.

Petitioner also argues that in selling to hospitals, industrial clinics and veterinary hospitals Parke, Davis is competing with the retail druggists with whom it entered into retailer fair trade agreements and therefore the contracts are invalid. The finding of the Court below that these sales were not made in competition with retailers who had signed fair trade contracts or with defendant was fully justified.

The evidence shows that Parke, Davis sells its products to retail pharmacies that are licensed by the State Board of Pharmacy as retail pharmacies. With these retailers, Parke, Davis has entered into fair trade agreements providing that in selling Parke, Davis' products at retail the retailers will abide by the minimum retail prices. That is all we are concerned with here. Jamel is a retailer and this case is only concerned with the prices at which it sells Parke, Davis' products at *retail*.

When Parke, Davis sells its products to retailers it has no control over their ultimate disposition except as to the prices at which they are sold at retail. Parke, Davis recognizes that the lines of distribution in the drug busi-

ness are not and cannot be rigid. Parke, Davis is rigid in that it sells only to certain types of customers such as licensed retail pharmacies, wholesale druggists, hospitals, industrial clinics and some veterinary hospitals. It recognizes however that the retail pharmacy sometimes sells to physicians, to the dispensary of a local industrial plant and perhaps on occasion to a school or a hospital. Some wholesale druggists may operate retail pharmacies and perhaps some retail pharmacies conduct a wholesale business. To meet this practical problem and to indicate that retailers are free to make such sales, if they so desire, Parke, Davis has specifically exempted them from its retailer fair trade agreements. Paragraph 7 of the Parke, Davis contract provides as follows:

> The provisions of this contract shall not apply to sales made by Retailer in good faith to established hospitals or clinics, to physicians, or agencies of the federal, state, county, or municipal governments or to educational institutions regularly supported in whole or in part by appropriations or grants of the federal, state, county or municipal governments.

Petitioner urges that Parke, Davis is a retailer because it fills orders which are small either as to dollar value or number of items. If this were so, every drug manufacturer who sells directly to retailers and every wholesale druggist would be a retailer, because all direct selling manufacturers and wholesalers of drugs ship and sell in small quantities. That is the way drug-stores and dispensaries, clinics and veterinary hospitals buy drugs.

The evidence in this case is that more than fifty per cent of the orders of Parke, Davis from all classes of trade are under twenty dollars; twenty seven to twenty

nine per cent are between ten and twenty dollars and twenty-nine per cent are under ten dollars.

Petitioner further urges that the fact that Parke, Davis paid New York City sales tax on some of the goods it sold is an admission that these were retail sales. The evidence on the trial showed that sales tax was paid by Parke, Davis on a very small percentage of sales, not "customarily" as contended by petitioner. In support of its case, petitioner referred to the definition of a retail sale as set forth in the Sales Tax Act as:

> A sale of . . . personal property to any person for any purpose other than (1) for resale . . . or (2) for use in performing the services of producing, fabricating, processing. . . . Administrative Code of City of New York, N41-1.0.

The language of the definition itself demonstrates the breadth of its scope. It is all inclusive and touches every sale except where the goods are held for resale or are to be used in the production or fabrication of other goods. An example of the breadth of the sales tax statute is to be found in *Buckley Funeral Home v. City of New York*, 105 N.Y.S. 2d 478 (Sup. Ct., N.Y. Cty. 1949), in which the Court held that the rental of cars to a funeral director for use at a funeral conducted by him is a taxable "sale."

A further illustration is to be found in Janel's exhibits "J" and "K," which are some of Parke, Davis' tax returns. They show that Parke, Davis pays a sales tax on the rental it received from Charles Pfizer & Co. on encapsulating machines. Janel's witness Pepper testified that such rentals were subject to tax under the Sales Tax Act (P.A. 57). Another item included in these tax returns is the compensating use tax (P.A. 56). That is a tax on goods purchased outside the city but used within the city.

It is quite obvious that this taxing statute was designed and is interpreted to raise the maximum amount of revenue for the City of New York. Within the limitations of the Constitution and the State statute authorizing the tax, it reaches every transfer of personal property and ignores the conventional distinctions between wholesale and retail transactions.

To assert that the payment of a sales tax is an admission that the transaction was at retail merely begs the ultimate question. Of more significance is an examination of the transaction itself and the criteria appropriate to its characterization. In *Roland Electric Co. v. Walling*, 326 U.S. 657, 66 S.Ct. 413, 90 L.Ed. 383 (1946), this Court was confronted with the determination of whether sales of motors to fabricators were retail sales under the Fair Labor Standards Act. In its search for an understanding of the term "retail" the Court examined a number of definitions and concluded as follows:

> Accordingly, in proportion as the meaning of the word "retail" is restricted to sales made in small quantities to ultimate consumers to meet *personal* rather than *commercial* and *industrial uses* of those articles, so it is correspondingly appropriate to restrict the word "service" to services to ultimate users of them for personal rather than commercial purposes. [Emphasis added] 326 U.S. at 675

All of the evidence offered in this case established that Parke, Davis' sales to hospitals and industrial clinics and dispensaries were for commercial or industrial uses. They were not for the personal use of ultimate consumers.

Finally, there is no evidence that Parke, Davis & Company is in competition with Jamel Sales Corp. Parke, Davis is a manufacturer of pharmaceuticals, biologicals, and sur-

gical dressings. Janel Sales Corp. operates a retail drug store at 488 Seventh Avenue in the City of New York. Parke, Davis distributes its products on a wholesale basis to hospitals, industrial clinics and veterinary hospitals. There is no evidence that Janel sells Parke, Davis' products to any such accounts. It is true that Janel's president testified that he sold some merchandise to some business concerns in his neighborhood. But there were no records to confirm such sales. Only cards bearing the names and addresses of some business houses were offered. He thought, but he did not know, whether or not he had sold these business houses any Parke, Davis' merchandise. He testified that these sales were made to customers who came into his store and bought like any other customer. He charged them the same price he charged other customers which was the retail price.

A salesman for Parke, Davis has the territory which includes the area in which Janel's store and the business houses which its president said were its customers are located. He examined the list of alleged customers and testified that he had never called on them for the purpose of selling them anything nor had any of them, to his knowledge, ever purchased any Parke, Davis' drugs from Parke, Davis & Company.

Argument

While petitioner submits that this case requires consideration of the Miller-Tydings and McGuire Act exemptions and the *McKesson & Roolins* doctrine, such is not the case. This is a matter which turns on its facts, which were disputed by the parties and resolved by the Trial Court.

Neither the Trial Court nor the Court of Appeals found it appropriate to apply the doctrines of *United States* v.

McKesson & Robbins, 351 U.S. 305, 76 S.Ct. 937, 100 L.Ed. 1209 (1954) or *Esso Standard Oil Co. v. Secatore's Inc.*, 246 F.2d 17 (1st Cir. 1952), *cert. denied* 355 U.S. 834. They recognized the basic difference in the facts. McKesson & Robbins is the largest drug wholesaler in the United States. It entered into fair trade contracts with other wholesalers as to goods it manufactured. Chief Justice Warren pointed out that McKesson & Robbins and the other wholesalers were on the same functional level and thus the contracts were invalid. Here, Parke, Davis is functionally a manufacturer and a wholesaler. It has no fair trade contracts with wholesalers. There is no evidence whatsoever that it functions as a retailer.

In the *Secatore's* case, Esso entered into fair trade agreements with its retailer filling station customers. Esso at the same time elected to go down in its level of distribution and sell its products at retail to operators of fleets of trucks. Thus Esso was a retailer competing with its retailer customers and selling its products for less than it would permit its retailer customers to sell them. That is not the situation here. Parke, Davis fills no prescriptions nor does it sell its goods to ultimate consumers as petitioner and other retailers do. Thus, there is no basis for applying *Secatore's* or *McKesson* or for concluding that the findings of fact of the Trial Court are clearly erroneous.

[redacted]

APPENDIX I

Feld-Crawford Act

(New York General Business Law)

§ 369-a. *Price fixing of certain commodities permitted.*

1. No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trademark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of New York by reason of any of the following provisions which may be contained in such contracts:

(a) That the buyer will not resell such commodities except at the price stipulated by the vendor; . . .

§ 369-b. *Unfair competition defined and made actionable.*

Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section three hundred sixty-nine-a, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

APPENDIX II

Administrative Code of City of New York

Sales Tax

§ N41-1.0 Definitions.—When used in this title the following terms shall mean or include:

. . . .

7. "Retail sale" or "sale at retail." A sale of . . . personal property to any person for any purpose other than (1) for resale . . . or (2) for use in performing the services of producing, fabricating, processing. . . .